

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION

IN RE:	:
	: CASE NO. 05-95374-JB
GERTRUDE G. ISAAC,	:
	: CHAPTER 7
Debtor.	:
_____	:
	:
GERTRUDE G. ISAAC,	::
	:
Movant,	:
	:
Vs.	: CONTESTED MATTER
	:
ZOM RESIDENTIAL SERVICES, INC.	:
d/b/a BELCOURT APARTMENT HOMES,	:
	:
Respondent.	:

ORDER

On October 28, 2005, Debtor filed an appeal of an Order entered on October 25, 2005, which granted a motion for relief from the automatic stay filed by Debtor's landlord, ZOM Residential Services, Inc., d/b/a Belcourt Apartments Homes (the "Landlord"). At the same time, Debtor filed a "Request To Proceed In Forma Pauperis In The Matter Of Appeal Relief From Automatic Stay," along with an affidavit supporting her request to proceed *in forma pauperis*.<sup>1</sup> The Court has carefully considered Debtor's request to proceed *in forma pauperis* on her appeal and makes the following

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<sup>1</sup> There is a split of authority as to whether a bankruptcy court has the authority to grant motions to proceed *in forma pauperis* on appeal. *Huff v. Brooks (In re Brooks)*, 175 B.R. 409, (Bankr. S.D. Ala. 1994)(bankruptcy courts as "units of the district court" have authority to deal with *in forma pauperis* motions). The Court finds the reasoning in *Brooks* to be persuasive. If, however, the district court should find that this Court does not have the authority to enter *in forma pauperis* orders in bankruptcy matters, this opinion constitutes proposed findings of fact and conclusions of law submitted to the district court pursuant to Fed. R. Bankr. P. 9033 for its review and use in entry of a final order.

findings of fact and conclusions of law.

Debtor filed a bankruptcy case under Chapter 7 *pro se* on August 22, 2005. On September 24, 2005, Debtor's Landlord filed a motion for relief from the automatic stay, and a hearing was scheduled for October 18, 2005. Debtor filed a response to the motion, disputing the amount of rent owed and claiming damages caused by flooding. At the hearing, counsel for the Landlord represented that the term of the lease agreement between Debtor and the Landlord ran from March 24, 2005 through September 30, 2005 and had expired; that Debtor had failed to pay pre-petition rent for the months of June, July, and August, and Debtor had not paid any post-petition rent; that the Landlord had obtained a writ of possession in state court in July of 2005 which Debtor had appealed; and that the Landlord filed a motion in state court to compel Debtor to pay rent into the registry of the state court at which time Debtor filed this bankruptcy case.

At the October 18, 2005 hearing in bankruptcy court, with the exception of the monthly rent owed, Debtor did not contest these statements.<sup>2</sup> Rather, she stated that she was disabled, and it would cause undue hardship and irreparable harm for her to leave the leased premises; that the landlord had not disclosed that the leased premises were in a flooding area and she had suffered \$4,500.00 in damages; that the Court should appoint a trustee to assume the lease; that this debt should be discharged; and that the automatic stay should be continued.

The Court explained that a landlord tenant dispute, including her claim for

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<sup>2</sup> Debtor stated her rent was \$575.00 per month, plus \$20.00 for water, or \$595.00. However, counsel for the Landlord noted that if Debtor did not pay by the 3<sup>rd</sup> day of the month, she was not entitled to a \$155.00 discount, in which case her rent was \$750.00 per month. Debtor did not contest this explanation.

damages, was governed by state law; that there was no factual or legal basis for a Chapter 7 Trustee to assume a residential lease that had expired; that Debtor would receive her discharge after the deadline for objecting to it had passed; and that there was no legal basis for continuing the automatic stay in the face of the state court's grant of the writ of possession. The Order lifting the stay was entered on October 25, 2005.

Debtor's request to pursue her appeal *in forma pauperis* is governed by 28 U.S.C. § 1915(a). In her request to proceed *in form pauperis* on her appeal and the supporting affidavit, Debtor has indicated that she is disabled and currently has no income. Her request for social security disability income is pending, and she continues to have expenses. It appears Debtor meets the test for indigence required by the statute.

Subsection (a)(3) of § 1915, however, imposes an additional requirement, that an "appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith." The term "good faith" does not have a moral or subjective meaning, rather it means the presentation of issues on appeal which are not frivolous. *Fleming v. Kemp*, 637 F. Supp. 1547, 1555 (M. D. Ga. 1986); *accord Free v. United States*, 879 F.2d 1535, 1536 (7<sup>th</sup> Cir. 1989). Thus, it appears that the bankruptcy court as the trial court should, in the first instance, determine whether the appeal is taken in good faith. *See Adams v. Inman (In re Inman)*, 218 B.R. 458, 459-60 (B.A.P. 9<sup>th</sup> Cir. 1998); *In re Winslow*, 133 B.R. 532, 533 (D. Colo. 1991); *Burrell v. Letterlough (In re Burrell)*, 150 B.R. 369 (Bankr. E.D. Va. 1992).

In the instant case, there is no factual or legal basis to support Debtor's appeal of the Order granting the motion for relief from the automatic stay. The state court had issued a writ of possession prior to the bankruptcy filing, and Debtor has appealed that matter in the state

courts. Debtor has not made any post-petition lease payments to the Landlord. The federal bankruptcy court has no authority to sit in review of the state court judgment, and there was no factual or legal basis presented under which this Court could have denied the motion for relief from the automatic stay. *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 415, 44 S.Ct. 149, 150, 68 L.Ed. 362 (1923); *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 103 S.Ct. 1303, 1315, 75 L.Ed. 2d 206 (1983). Thus, the Court certifies that the appeal is not taken in good faith within the meaning of 28 U.S.C. § 1915(a). Accordingly, the request to proceed *in forma pauperis* on appeal should be denied, and if Debtor chooses to continue her appeal, she should pay the required filing fee within fifteen days from the entry of this Order.

IT IS SO ORDERED, this \_\_\_\_ day of November, 2005.

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JOYCE BIHARY  
UNITED STATES BANKRUPTCY JUDGE

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